ARGUMENT

I. The Court Should Grant the Petition on the Statute of Limitations in Order to Clarify the Law on this Question and Uphold the D.C. Circuit's Decision, Which is Consistent With the Fifth Circuit but Contrary to the Tenth Circuit.

The decision below, *Amoco Production Co. v. Watson*, 410 F.3d 722 (D.C. Cir. 2005) (Pet'r App. 1a), held that the six-year statute of limitations in 28 U.S.C. § 2415(a) (2000) does not apply to MMS orders to oil and gas producers to pay additional royalties under their leases. Section 2415(a) (Pet'r App. 179a) provides:

> every *action for money damages* brought by the United States . . . which is founded upon any contract . . . shall be barred unless the *complaint* is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings . . . , whichever is later.

(Emphasis added.) The D.C. Circuit explained that:

> [t]he phrase 'action for money damages' points strongly to a suit in a court of law, rather than an agency enforcement order that happens to concern money under a statutory scheme . . . . Any doubt is removed by the fact that subsection 2415(a) measures the limitations period from the filing of a 'complaint.' It strains legal language to construe this administrative compliance order as a

> 'complaint' for money damages in any ordinary sense of the term.

410 F.3d at 733 (Pet'r App. 16a-17a). The D.C. Circuit therefore "join[ed] the Fifth Circuit, *see Phillips Petroleum Co. v. Johnson,* No. 93-1377, 1994 WL 484506 (5th Cir. Sept. 7, 1994)," in concluding that § 2415(a) does not apply to MMS orders for the payment of additional royalties, because they are not "action[s] . . . initiated by the filing of a complaint." 410 F.3d at 734-35 (Pet'r App. 20a.)

The Fifth Circuit found that such MMS orders not only are not "actions," but also are not actions "for money damages." It held that "[t]he term 'action for money damages' refers to a suit in court seeking compensatory damages." *Id.* at *1. According to the Fifth Circuit, the MMS orders were not "actions" since no complaint was filed, and they were not for "money damages" since royalties are not compensatory but are instead an obligation under the lease.[2]

In contrast, the Tenth Circuit in *OXY USA, Inc. v. Babbitt*, 268 F.3d 1001 (2001) (*en banc*), held that an MMS order to pay additional royalties is an "action" under § 2415(a). The Tenth Circuit based its decision on its interpretation of the purpose behind the statute, 268 F.3d at 1005-6, rather than on the plain language of the statute, *id.* at 1009-12 (Briscoe, J.,

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[2]Unpublished decisions of the Fifth Circuit issued before January 1, 1996 are precedent, although they "should normally be cited only when the doctrine of res judicata, collateral estoppel or law of the case is applicable." Fifth Circuit Rule 47.5.3. In *Phillips*, however, the court stated that it issued the decision specifically to address the statute of limitations, which was "an issue that we inadvertently omitted from our previous opinion," and also stated that "[t]his supplemental opinion modifies our opinion issued on June 10, 1994" and published at 22 F.3d 616. 1994 WL 484506 at *1.

dissenting). The Tenth Circuit went on to hold that oil and gas leases are contracts, so that the MMS orders are "founded on contract," *id.* at 1006-7, and that an order to pay money under the leases is equivalent to a breach of contract action and is therefore an action for "money damages," *id.* at 1008.

Although there is now a separate seven-year statute of limitations that applies to MMS orders for payment of royalties on oil and gas produced from federal lands, as the D.C. Circuit noted, 410 F.3d at 732 n.1 (Pet'r App. 16a), *see* § 4 of the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996, Pub. L. No. 104-185, 110 Stat. 1700 ("RSFA"), 30 U.S.C. § 1724 (2000), RSFA states that this provision "shall not apply with respect to Indian lands," RSFA § 9, 30 U.S.C. § 1701 note (2000), App. 8a. The split among the circuits on the applicability of the six-year statute of limitations therefore continues to have a substantial impact on the collection of royalties from Indian lands.[3] Many of the oil- and gas-producing tribes, including the Jicarilla Apache Nation, are located within the Tenth Circuit, and so are at risk of losing substantial revenues. Moreover, the split in the circuits may lead to different results for different tribes, depending on where the tribes are located and where royalty orders are litigated, thereby encouraging forum-shopping and races to the courthouse on the part of both tribes and lessee oil and gas companies.

Further, the question whether § 2415(a) applies to the issuance of administrative orders arises in contexts other than orders to pay oil and gas royalties, thus drawing more courts of

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[3] Royalties from Indian leases constituted more than 10% of total royalties from federal and Indian onshore oil and gas in 2005, and have consistently been at that level for at least the past ten years. *See* MMS Website, http://www.mrm.mms.gov/MRMWebStats/default.aspx.

appeals into the conflict. *See, e.g., United States v. Hanover Ins. Co.*, 82 F.3d 1052 (Fed. Cir. 1996) (applying § 2415(a) to Customs Service demand for payment); *King v. Railroad Retirement Bd.*, 981 F.2d 365, 367 (8th Cir. 1992) (refusing to apply § 2415(a) to Board proceeding to recover overpayment of disability benefits). The Court should grant the petition to resolve this conflict.

II. Applying the Six-Year Statute of Limitations to MMS Orders to Pay Royalties Results in a Windfall to the Oil and Gas Industry and Decreased Revenues for the Jicarilla Apache Nation and Other Tribes.

There are substantial royalties owing to the Jicarilla Apache Nation for periods that go back more than six years from the date of issuance of the relevant MMS orders. For example, in 1998 MMS issued "major portion" orders for Jicarilla leases for the period 1985-1995. Several of these orders are pending on appeal before the MMS, and the tribe is owed over $70 million in royalties from the oil and gas industry pursuant to these orders.[4] The tribe also is still investigating

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[4] A "major portion" order refers to § 3(c) of the standard BIA Indian Lease Form 157, which provides:

> "value" for the purposes hereof [the calculation of royalties] may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered . . . at the time of production for the major portion of the oil of the same gravity, and gas . . . produced and sold from the field where the leased lands are situated.

See also 30 C.F.R. § 206.152(a)(3)(ii) (1988). The MMS major portion orders required oil and gas producers to re-calculate royalties owed to the tribe based on the major portion price determined by MMS and set forth in

(continued...)

some of the instances of underreporting that occurred in the past, discussed below, which may call for MMS to issue additional orders that go back more than six years. These past-due royalties result from a combination of factors: pervasive underreporting of royalties by the oil and gas industry; MMS's failure to adequately administer and enforce tribal lease provisions; and the nature of the audit process, which by definition is retroactive.

A. Tribes are Owed Substantial Revenues Dating Back More Than Six Years Because of the Oil and Gas Industry's Long-Standing Practice of Underpaying Royalties.

The oil and gas industry has a long history of underpaying royalties to Indian tribes. *See generally* Report of the Commission, Fiscal Accountability of the Nation's Energy Resources (Jan. 1982) ("Linowes Commission Report") (selected portions at App. 1a - 7a). Twenty-five years ago, after public outrage over allegations of royalty underpayment, fraud and outright theft, the Secretary of Interior established the Linowes Commission to investigate "serious allegations of massive irregularities in royalty payments due the Federal government, Indian tribes, and States." *Id.* (Letter from David Linowes to Secretary James G. Watt (January 21, 1982)), App. 1a. After an extensive investigation, the Linowes Commission concluded:

> Management of royalties for the nation's energy resources has been a failure for more than 20 years. Because the Federal government has not adequately managed this multibillion dollar

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[4](...continued)
the orders.

> enterprise, the oil and gas industry is not paying all the royalties it rightly owes. . . . The results of individual audits, which have often uncovered large underpayments, suggest that hundreds of millions of dollars due the U.S. Treasury, the States, and Indian tribes are going uncollected every year.

Id. at xv, App. 3a.

Congress responded by adopting the royalty reforms in the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1701 *et seq.* (2000) ("FOGRMA"). The legislative history of FOGRMA explains that the oil and gas industry has operated "essentially on an honor system," without sufficient verification of industry reporting, and clarifies that FOGRMA is intended to ensure the prompt and accurate collection of oil and gas royalties. H.R. Rep. No. 97-859, at 15 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4268, 4269; *see also* 30 U.S.C. § 1701 (2000), App. 8a. The House Report estimated that as much as "half a billion dollars is going uncollected annually" and emphasized the importance of this lost revenue to Indian tribes. U.S.C.C.A.N. at 4269-4270.

Unfortunately, the enactment of FOGRMA did not stop the oil and gas companies from finding ways to underpay royalties, and the practice continues to this day. *See, e.g.*, "Wait! There's More Money to Collect," Report of the Project on Government Oversight (August 1996), available at http://www.pogo.org/p/environment/eo-960101-oilroyalties.html (reporting on vast unpaid royalties on oil production since 1985 and describing methods that companies use to reduce royalties, including setting posted prices at artificially low levels; concealing true value of oil through various marketing arrangements; and misreporting

transportation costs and other deductions from the price of oil); *More Public Drilling? Let's Collect Bills First*, USA Today (April 6, 2001), available at http://www.usatoday.com/news/opinion/2001-04-06-nceditf.htm ("industry has shorted the government on oil-royalty payments alone by about $100 million a year" and "similar questions are being raised about gas"); Jim Morris, *Making Them Pay*, US News & World Report, (May 14, 2001), http://www.usnews.com/usnews/biztech/articles/010514/archive_001087.htm (describing various methods of underpaying royalties).

Various False Claims Act lawsuits filed by industry whistleblowers provide further evidence that the oil and gas industry continues to underreport royalties: these lawsuits explain how lessees undervalue gas using a variety of schemes, including by calculating royalties based on sales to affiliates instead of arm's-length transactions; deducting more than the actual costs incurred for transportation and processing services; and undermeasuring and undervaluing gas and natural gas liquids. *See, e.g., U.S. ex rel Harrold E. (Gene) Wright v. AGIP Petroleum Co.*, No. 9:98CV30 (E.D. Tex. filed February 3, 1998), transferred No. 5:03-CV-264 (E.D. Tex.).

Still more evidence is provided by instances in which MMS actually identified these unlawful practices. *See, e.g., Union Texas Petroleum*, 153 IBLA 170, 172 (2000) (failure to perform dual accounting[5]; failure to use accurate volumes and

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[5]Dual accounting, required in Indian leases, means that the lessee must calculate both (1) the value of the unprocessed gas and (2) the combined values of the processed gas and separated liquids after processing (less allowed processing costs), and pay royalties as a percentage of the higher of the two values. 30 C.F.R. §§ 206.155 (1988); *see also* 30 C.F.R. § 206.171 (2005).

Btu measurements; and undervaluation of gas by using contract price instead of maximum lawful price and by taking processing allowance greater than actual cost); *Marathon Oil Co.*, 149 IBLA 287, 292-93 (1999) (failure to dual account); *ARCO*, 131 IBLA 299, 304 (1994) (undervalued production due to miscategorization of oil); *Amoco Production Co.*, 123 IBLA 278, 293 (1992) (repeated royalty underpayments caused by erroneous claims for refunds). Because the oil and gas industry's practice of undervaluing and underreporting royalties dates back about 50 years and continues into the present, it is unavoidable that there are substantial uncollected royalties owing to tribes that would be barred by the six-year statute of limitations.[6]

B. The Continuing Failure of MMS to Adequately Administer and Enforce Lease Terms has Compounded the Problem of Unpaid Royalties.

In addition, the Interior Department has fallen far short of its duty to "ensure the prompt and proper collection . . . of oil and gas revenues," 30 U.S.C. § 1701(b)(3) (2000), App. 9a.

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[6] Beginning in 2000, companies generally pay royalties on gas from Indian leases based on published index prices, as provided in 30 C.F.R. § 206.172 (2005), intended to minimize opportunities for underreporting and underpayment. The published index prices are, however, based on reports from the oil and gas companies themselves, and do not always reflect the true sale prices. *See Wait! There's More Money to Collect*, Report of the Project on Government Oversight (August 1996) http://www.pogo.org/p/environment/eo-960101-oilroyalties.html (posted prices for oil below fair market value); Edmund L. Andrews, *As Profits Soar, Companies Pay U.S. Less for Gas Rights*, New York Times, January 23, 2006, at A-1 (disparities in prices reported for gas). Moreover, not all tribal leases are subject to this provision, § 206.172(a), and tribes also may request MMS to exclude their leases from this method of valuation, § 206.172(f).

The Linowes Commission found that "[t]he government's royalty recordkeeping for Federal and Indian oil and gas leases is in disarray." Linowes Commission Report at xv, App. 3a. *See also OXY*, 268 F.3d at 1013 (Briscoe, J., dissenting):

> when Congress enacted the FOGRMA it was primarily concerned with (1) lost revenues resulting from poor royalty accounting practices by administrative agencies; (2) substandard auditing and verification procedures; (3) lax security on certain lease sites resulting in theft and fraud; and (4) an inadequate and inflexible array of enforcement tools.

Despite Congressional hearings, remedial legislation, an adverse Inspector General report,[7] and criticisms in the press, the Interior Department's failure to properly administer royalties has continued. Indeed, the Jicarilla Apache Nation was forced to sue the Department to enforce the dual accounting requirement in its leases. *Jicarilla Apache Tribe v. Supron Energy Corp.*, 479 F. Supp. 536, *aff'd in part and rev'd and remanded in part on other grounds*, 782 F.2d 855 (10th Cir. 1986) (*en banc*) (*adopting dissenting opinion at* 728 F.2d 1555 (1984)), *modified*, 793 F. 2d 1171 (10th Cir. 1986), *cert. denied*, 479 U.S. 970 (1986) (Secretary of Interior breached his fiduciary duty to the tribe by failing to administer and enforce the dual accounting and other provisions of the tribe's leases).

By participating in audits of royalty payments, the Jicarilla Apache Nation has discovered many other examples of the Department, through MMS, failing to carry out its royalty

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[7] Final Report on an Audit of the Minerals Management Service Audit Offices, OIG 2003-I-0023 (March 31, 2003), available at http://www.oig.doi.gov/upload/2003i0023.pdf.

management duties. For instance, MMS has failed to account for affiliate sales in verifying the value of gas reported for royalty purposes. *See, e.g., Burlington Resources Oil & Gas Co.*, 151 IBLA 144, 158 (1999) (in calculating major portion prices for gas produced from Indian lands, MMS used a database that did not distinguish between arm's-length and non-arm's-length sales). Because producers can sell gas to affiliated entities at artificially low prices, thus lowering the value of their gas for royalty valuation purposes, and subsequently can have the affiliates resell at a higher price, so that no revenue is lost, *see* Linowes Commission Report at 23, 64, 65, App. 4a - 7a, the arm's-length sale requirement is essential for arriving at a legitimate value for gas.[8]

Other problems arise because the MMS database does not distinguish between Btu values or gas classifications, despite the fact that prices for different Btu values and different gas classifications can vary by wide margins. *See, e.g.*, 30 C.F.R. § 206.154 (1988) (adjustments to be made for gas quality); 30 C.F.R. § 206.173(b) (2005) (providing different values for different Btu ranges). Moreover, when errors in reporting have been discovered through audits, MMS has not gone back to correct its database, so that the undervaluation created by those errors is perpetuated.

MMS also allows oil and gas companies to deduct from their current royalty obligations the amounts they claim they overpaid as royalties in the past, a practice known as taking recoupments. 30 C.F.R. § 218.53 (1988); 30 C.F.R. § 218.53 (2005); *see also Amoco Production Co.*, 173 IBLA at 279. The companies may take recoupments without identifying the

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[8] One of the purposes of the "major portion" provision in Indian leases is to ensure that royalties are paid on values at least equal to those received in comparable arm's-length transactions.

royalties allegedly overpaid, providing ample opportunity to take advantage of the system. Moreover, the current MMS list of recoupments on Indian leases includes recoupments taken for periods going back to 1987, and records balances that are still recoupable for periods going back to 1990. The companies thus are able to go back well beyond six years to make adjustments that reduce their royalty obligations. It would certainly aggravate the royalty underpayment problem if the statute of limitations prevented MMS from reviewing these recoupments and requiring reimbursements when they are incorrectly taken.

As final examples, MMS has routinely permitted companies to claim the maximum permissible amount of transportation and processing costs (which are deducted from the value of gas before royalties are calculated) without verifying that those costs actually were incurred. *See* 30 C.F.R. §§ 206.156(c), 206.157 (1988) (transportation allowances); 30 C.F.R. §§ 206.158(c)(2), 206.159 (1988) (processing allowances). And MMS has failed to enforce against late reporting and late payments, despite the fact that royalties are due the month after the month of production, 30 C.F.R. § 218.50 (1988); 30 C.F.R. § 218.50 (2005), and late payment interest is required under FOGRMA and the MMS regulations, 30 U.S.C. § 1721 (2000); 30 C.F.R. § 218.54 (1988); 30 C.F.R. § 218.54 (2005).

By failing to adequately verify and audit royalty reports and enforce lease terms, MMS has exacerbated the existing problem of royalty underpayments. According to one recent report,

> At a time when energy prices and industry profits are soaring, the federal government collected little more money last year than it did five years ago . . . .The possible losses to

> taxpayers in gas could be even higher than the losses tied to the scandals over oil royalties. For one thing, natural gas production on federal land is worth twice as much as oil. Moreover, the Interior Department has scaled back on full audits, pushed out a couple of its more aggressive auditors and been criticized by its own inspector general for the audits that it did pursue.

Edmund L. Andrews, *As Profits Soar, Companies Pay U.S. Less for Gas Rights*, New York Times, January 23, 2006, at A-1. *See also Making Them Pay* ("For decades, court documents show, producers have set artificially low prices and used other dubious means to underpay by billions of dollars, partly because regulators either weren't mindful or were disinclined to act").[9]

C. The Audit Process by Its Nature is Retroactive and Lengthy, Often Involving Periods Dating Back More Than Six Years, but It has Confirmed that Substantial Royalties are Owed to Tribes.

The MMS audit process involves the review of records and reports of royalty payments made in the past to determine whether royalties have been correctly calculated; it is thus a

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[9] The Department of the Interior's Office of Inspector General is currently working, together with the General Accounting Office, on yet another report on the scope of underreporting and underpayment by the oil and gas industry of natural gas royalties on public land. Senator Schumer (D-NY) requested the report on January 23, 2006, and it is due to be completed within the next few months. *See* http://www.schumer.senate.gov/SchumerWebsite/pressroom/press_releases/2006/PR19.Gas%20Letter.012306.html.

retroactive process. The audit process is necessary because royalty payments are based on companies' own reports of their sales, 30 C.F.R. pt. 210 (1988); 30 C.F.R. pt. 210 (2005), and it is made even more necessary in light of the companies' long-standing practice of undervaluing and underreporting oil and gas for royalty purposes.

MMS begins an audit by reviewing a few sample months from a few sample leases. If this review reveals errors in reporting, MMS issues a letter to the production company that is the lessee of record, informing the company of the initial finding of discrepancy and allowing the company time to respond. MMS then considers the response and may or may not issue an order calculating the underpayment for the audited months and directing the company to pay any additional royalties due for the remainder of the audit period. *See Union Texas Petroleum*, 153 IBLA at 179; *BHP Petroleum (Americas) Inc.*, 124 IBLA 185, 187-88 (1992) (cases describing the audit process). The MMS order thus already is issued substantially after the audit period in question. Indeed, the MMS audit cases cited in section A above all involved audit periods beginning more than six years before the relevant MMS orders were issued.

In addition, about 15 years ago when the price of natural gas produced from the Jicarilla Apache Reservation dropped and the tribe's revenues fell accordingly, the Jicarilla Apache Nation began reviewing and eventually participating in MMS audits of its leases, *see* FOGRMA § 202, 30 U.S.C. § 1732 (2000). The tribe discovered many of the royalty underpayment schemes described in Section A above, and also discovered that MMS had failed to identify any number of reporting errors, as described in Section B above. Correcting these errors would result in MMS orders that are even more likely than the initial

orders to be issued more than six years from the beginning of the audit period.[10]

Applying the six-year statute of limitations in § 2415(a) to MMS orders to pay additional royalties thus would let oil and gas production companies off the hook for millions of dollars of unpaid royalties, essentially rewarding them for their malfeasance. Moreover, allowing the Tenth Circuit *OXY* decision to stand will have a disproportionate impact on Indian tribes, since many oil- and gas-owning tribes have reservations within the Tenth Circuit. The *OXY* decision has already affected the Jicarilla Apache Nation's ability to negotiate for and collect additional royalties owing to the tribe, for example causing the tribe and MMS to accept discounts in settlements of orders to pay royalties.

Finally, the United States, through the Department of the Interior and MMS, has a trust obligation to ensure that tribes are receiving all the royalties due to them. *See generally Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (seminal case stating that the United States has a "moral obligation of the highest responsibility and trust" to Indian tribes and that the federal government's "conduct . . . in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards"); *Supron*, 728 F.2d at 1563 (Secretary's administration of tribal oil and gas reserves "must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary"); *Pawnee v. United States*, 830 F.2d 187, 189-91 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); *Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 794 & n.15 (9th Cir. 1986); *see*

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[10]One of the ways these errors have been addressed is through the major portion orders referenced in this brief.

also 30 C.F.R. § 206.150(d) (1988); 30 C.F.R. § 206.150(d) (2005) (referring to "the trust responsibilities of the United States with respect to the administration of Indian oil and gas leases"). In fact, the Jicarilla Apache Nation has filed suit against the United States for, *inter alia*, the United States' failure to properly oversee and collect the royalties owed to the tribe. *Jicarilla Apache Nation v. United States*, No. 1:02-cv-00025-FMA (Fed. Cl. filed January 8, 2002). If the Court upholds the D.C. Circuit decision below, liability for underpayment of royalties will be shifted away from the United States and placed squarely on the oil and gas production companies that engaged in various schemes to underpay the royalties in the first instance.

CONCLUSION

The Court should grant the petition for a writ of certiorari on the question of the statute of limitations.

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March 13, 2006